United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Signed

No. 74-1752 **74-1752**

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES L. DILLARD,

Plaintiff-Appellant

v.

ANNABELLE B. DILLARD, DISTRICT DIRECTOR. Internal Revenue Service, MR. GLANTZ, Auditor, MR. ANTHONY FABISZEWSKI, Revenue Officer, FLORENCE M. KELLY, Admin. Judge of the Family Court of the State of New York in the City of New York,

Defendants-Appellees

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE FEDERAL APPELLEES

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STATEMENT OF THE ISSUE PRESENTED

Whether the appellant's complaint, requesting that his wife be required to file a joint income tax return with him for 1972, was properly dismissed by the District Court.

STATEMENT OF THE CASE

This action was commenced by the appellant, James L. Dillard, against his wife, certain officers of the Internal Revenue Service, and a New York state court judge. His complaint vis-a-vis the Internal Revenue Service officials sought an order which would allow him to file a joint federal income tax return with his defendant-wife for 1972. The United States filed a motion to dismiss on the grounds that (1) the complaint failed to state the grounds for federal court jurisdiction, pursuant to Rule 8(a) of the Federal Rules of Civil Procedure; (2) the complaint sought a declaratory judgment with respect to federal taxes; and (3) the complaint failed to state a claim upon which relief might be granted. Upon the motions of the United States and the Attorney General of the State of New York, the District Court, on April 9, 1974, dismissed the case on the merits. Mr. Dillard filed a notice of appeal on May 30, 1974. (Docket Entries.) 1/

1/ Documents referred to are the original documents comprising the record on appeal as transmitted to this Court by the Clerk of the District Court.

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT AGAINST THE INTERNAL REVENUE SERVICE OFFICIALS SINCE THE COMPLAINT SOUGHT, IN EFFECT, A DECLARATORY JUDGMENT WITH RESPECT TO FEDERAL TAXES, AND THE RELIEF REQUESTED WAS OTHERWISE UNAVAILABLE

The jurisdiction of federal District Courts is limited by statute, and it is well settled that the plaintiff must allege in his pleading the facts essential to show jurisdiction. McNutt v. General Motors & Corp., 298 U.S. 178, 182, 189 (1936). See also Rule 8(a)(1), Federal Rules of Civil Procedure. Federal courts, however, are liberal in their pleading practices, particularly with respect to pro se complaints. Haines v. Kerner, 404 U.S. 519, 520 (1972); Birnbaum v. Trussell, 347 F. 2d 86 (C.A. 2, 1965).[2/]

In this action the appellant's complaint, which was primarily concerned with his marital problems and various dealings with the family court, alleged that the defendants' actions violated his constitutional rights to due process and equal protection under the Fourteenth Amendment. With respect to the officers of the

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2/ This Court has also indicated that it would not affirm a dismissal based upon the ground that a plaintiff failed to comply with Rule 8 of the Federal Rules of Civil Procedure, because had the District Court judge taken this view, amendment of the complaint would nevertheless have been allowed. Klebanow v. New York Produce Exchange, 344 F. 2d 294, 300 (1965).

Internal Revenue Service in particular, appellant apparently sought an order which would allow him to file a joint federal income tax return with his wife for 1972. (Compl. 2.)

At the outset, it should be noted that if appellant and his wife both desire to file a joint income tax return for 1972, or any other year, they may do so as long as the statutory prerequisites, set out in Section 6013 of the Internal Revenue Code of 1954, Appendix, infra, are met. However, appellant's suit against the Internal Revenue Service officers, demanding that he be allowed to file such a return on behalf of him and his wife, was properly dismissed by the District Court.

First, the relief sought is in the nature of a declaratory judgment with respect to federal taxes, and such action is expressly prohibited by the terms of the so called Declaratory Judgment Act (28 U.S.C., Section 2201, Appendix, infra). Indeed, the District Court has no jurisdiction to enter a declaratory judgment with respect to federal taxes. Mitchell v. Riddell, 402 F. 2d 842, 846 (C.A. 9, 1968).

Secondly, under Section 6013, Internal Revenue Code of 1954, Appendix, infra, the filing of a joint return is purely optional by the husband and wife, and neither spouse can require the other to file such a return. Moore v. United States, 37 F. Supp. 136 (Ct. Cl., 1941), cert. denied, 314 U.S. 619 (1941). The Internal

Revenue Service and the court are without authority to compel a husband and wife to file jointly. Thus, the District Court properly dismissed the complaint as to the officers of the Internal Revenue Service, since the relief requested was not available.

CONCLUSION

For the reasons stated above, the order of the District Court was correct and should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1974.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on appellant appearing pro se by mailing four copies thereof on this 30th day of September, 1974, in an envelope, with postage prepaid, properly addressed to him as follows:

Mr. James L. Dillard
216 Reid Avenue
Brooklyn, New York 11221

Gilbert E. Andrews
GILBERT E. ANDREWS, cmt.
Attorney.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6013. JOINT RETURNS OF INCOME TAX BY HUSBAND AND WIFE.

(a) Joint Returns.--A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions, except as provided below:

(1) no joint return shall be made if either the husband or wife at any time during the taxable year is a nonresident alien;

(2) no joint return shall be made if the husband and wife have different taxable years; except that if such taxable years begin on the same day and end on different days because of the death of either or both, then the joint return may be made with respect to the taxable year of each. The above exception shall not apply if the surviving spouse remarries before the close of his taxable year, nor if the taxable year of either spouse is a fractional part of a year under section 443(a)(1);

* * *

(b) Joint Return After Filing Separate Return.--

(1) In general.--Except as provided in paragraph (2), if an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse under subsection (a) and the time prescribed by law for filing the return for such taxable year has expired, such individual and his spouse may nevertheless make a joint return for such taxable year. A joint return filed by the husband and wife under this subsection shall constitute the return of the husband and wife for such taxable year, and all payments, credits, refunds, or other repayments made or allowed with respect to the separate return of either spouse for such taxable year shall be taken into account in determining the extent to which the tax based upon the joint return has been paid. If a joint return is made under this subsection, any election (other than

the election to file a separate return) made by either spouse in his separate return for such taxable year with respect to the treatment of any income, deduction, or credit of such spouse shall not be changed in the making of the joint return where such election would have been irrevocable if the joint return had not been made. If a joint return is made under this subsection after the death of either spouse, such return with respect to the decedent can be made only by his executor or administrator.

(2) Limitations for making of election.--The election provided for in paragraph (1) may not be made--

(A) unless there is paid in full at or before the time of the filing of the joint return the amount shown as tax upon such joint return; or

(B) after the expiration of 3 years from the last date prescribed by law for filing the return for such taxable year (determined without regard to any extension of time granted to either spouse); or

(C) [as amended by Sec. 73, Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606] after there has been mailed to either spouse, with respect to such taxable year, a notice of deficiency under section 6212, if the spouse, as to such notice, files a petition with the Tax Court of the United States within the time prescribed in section 6213; or

(D) after either spouse has commenced a suit in any court for the recovery of any part of the tax for such taxable year; or

(E) after either spouse has entered into a closing agreement under section 7121 with respect to such taxable year, or after any civil or criminal case arising against either spouse with respect to such taxable year has been compromised under section 7122.

* * *

28 U.S.C.:

§ 2201 [as amended by Sec. 111, Act of May 24, 1949, c. 139, 63 Stat. 89]. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.